

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM D. MCCULLOUGH

Claimant

VS.

HF RUBBER MACHINERY, INC.

Respondent

AND

TRAVELERS CASUALTY & SURETY COMPANY

Insurance Carrier

Docket No. 1,041,964

ORDER

Claimant appealed the May 26, 2011, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on August 19, 2011. The Director appointed E. L. Lee Kinch of Wichita, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the Board considered the May 28, 2009, independent medical evaluation (IME) report of Dr. Dan M. Gurba. On November 24, 2008, ALJ Avery referred claimant to Dr. Gurba for an IME. Dr. Gurba was to render an opinion as to what, if any, medical treatment was necessary to cure and relieve claimant's left knee injury.¹

¹ The Board notes the IME report of Dr. Gurba had no impact on its decision. The evaluation was of the left knee only, and claimant had yet to reach maximum medical improvement.

At oral argument before the Board the parties stipulated that as a result of the accident claimant has a 50% functional impairment to the left lower extremity. The parties also stipulated that if the Board finds that claimant suffered a work-related low back injury, claimant has an 85% work disability² (70% task loss and 100% wage loss).

ISSUES

In the May 26, 2011, Award, ALJ Avery determined claimant sustained a 50% functional impairment to his left lower extremity. The ALJ concluded that respondent did not satisfy its burden of proving preexisting impairment for a deduction in impairment. ALJ Avery further found that although Dr. Bieri converted the left lower extremity rating to a 10% whole person rating to account for claimant's back pain complaints allegedly from limping, Dr. Bieri also testified there was no specific injury to the back, claimant had back pain before his injury and the 10% whole person rating (an extrapolation from claimant's knee injury) would have been the same with or without the doctor's accounting for back pain. The ALJ determined claimant failed to prove an accidental injury to his back. With regard to permanent total disability, the ALJ stated in his Order:

If Dr. Bieri's whole body rating were applicable, the Court would find claimant is permanently and totally disabled based upon the assessment of Dick Santner, claimant's vocational expert. . . .³

The ALJ limited claimant's permanent disability benefits to those for a 50% functional impairment to his left lower extremity.

Claimant requests the Board modify the May 26, 2011, Award to find that claimant is permanently and totally disabled. Claimant asserts that considering the conclusions of Dr. Peter V. Bieri, claimant sustained and is entitled to a whole person impairment when taking into account his low back pain resulting from gait derangement. Claimant argues he is realistically unemployable and the opinions of vocational expert Dick Santner are uncontroverted that claimant is not capable of engaging in substantial, gainful employment. If the Board finds that claimant is not permanently and totally disabled, claimant requests the Board modify the Award to award claimant an 85% work disability.

Respondent contends claimant's argument does not take into consideration Dr. Bieri's overall testimony but, rather, focuses on isolated comments made by the doctor. Respondent asserts that in light of Dr. Bieri's testimony indicating claimant does not have any ratable injury to the back (and, therefore, claimant has no ratable whole person injury and is not eligible for permanent total disability or work disability benefits), the testimony

² A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

³ ALJ Award (May 26, 2011) at 3.

of Mr. Santner is irrelevant and should be disregarded. Respondent requests the Board affirm the Award.

The issues before the Board on this appeal are as follows:

1. What is the nature and extent of claimant's disability? Specifically, did claimant suffer a back injury arising out of and in the course of employment or did claimant suffer only a scheduled left knee injury? Claimant alleges a low back injury resulting from gait derangement. Respondent denies that claimant suffered a work-related back injury.

2. Did claimant suffer a permanent back injury? If so, is claimant permanently and totally disabled?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the time of the regular hearing, claimant was 52 years of age. Claimant worked approximately nine and one-half years for respondent until being discharged on August 18, 2008. Claimant was a welder, grinder and polisher. Claimant graduated from high school and has been a welder most of his adult life. He has also done metal fabrication. Claimant has no computer skills, no commercial driver's license and few skills, other than being a welder.

Claimant alleges a series of repetitive injuries to the left knee culminating on August 17, 2008.⁴ Respondent admits claimant suffered a left knee injury arising out of and in the course of employment with respondent. Claimant has been unemployed since being discharged and has applied for Social Security disability benefits.

On July 21, 2008, claimant saw Dr. Stephen Saylor, his family physician, for a back injury. While walking his dog, claimant was pulled when he got wrapped up with the chain, causing back pain.⁵ Claimant has high blood pressure. His other physical problems are the left knee injury and alleged back injury from this claim. Claimant indicated he has no other psychological or physical conditions that would affect his ability to work.⁶

⁴ At page 5 of the regular hearing transcript, the parties stipulated to an accident date of August 17, 2008.

⁵ P.H. Trans. (Nov. 19, 2008) at 23.

⁶ R.H. Trans. at 17-18.

After suffering a left knee injury at work, claimant was seen at Dr. Saylor's office on August 12, 2008, where he reported that his knee popped the day before.⁷ Claimant's primary complaints were of numbness in both hands, mainly in the fingers, and trouble with the left knee. The medical reports of Dr. Saylor do not indicate claimant complained of back symptoms. Dr. Saylor referred claimant to Dr. Peter S. Lapse, an orthopedic surgeon.

Dr. Lapse saw claimant on August 21, 2008. X-rays were taken of claimant's left knee and showed bone-on-bone changes and squaring with Fairbanks changes in the medial compartment. In 1989 Dr. Lapse performed an arthroscopy and a partial medial meniscectomy on claimant's left knee.⁸ Dr. Lapse's August 21, 2008, report does not indicate claimant made complaints of back problems.

At the request of claimant's counsel, claimant was examined by Dr. Lynn A. Curtis, a physical medicine, rehabilitation and spinal cord injury specialist. Dr. Curtis saw claimant on September 11, 2008. Dr. Curtis obtained a medical history, including a history of the injury; reviewed medical records from Stormont-Vail HealthCare; reviewed an x-ray of the left knee; and physically examined claimant. The physical examination was concentrated on the left knee. Claimant testified Dr. Curtis prescribed a cane.⁹ Dr. Curtis' report indicates claimant was not using an adaptive device. Nor does the report state a cane was prescribed. However, Dr. Curtis observed that claimant had a noticeable limp and recommended a knee brace. Dr. Curtis' medical report does not state claimant complained of back symptoms.

None of the physicians who provided treatment for claimant's injured left knee testified. The ALJ referred claimant to Dr. Dan M. Gurba for an IME. The IME report dated May 28, 2009, is a part of this record. On July 2, 2009, after receiving an IME report from Dr. Gurba the ALJ ordered medical treatment to be provided by Dr. Gurba. His medical reports concerning claimant's treatment were not made part of the record. From the record, it is deduced that claimant received extensive treatment from Dr. Gurba, including a left total knee replacement.

At the November 19, 2008, preliminary hearing, claimant testified that as a result of limping, his right hip began hurting.¹⁰ However, no allegations of a back injury were made by claimant at either preliminary hearing. Claimant testified that he received treatment for back symptoms from Dr. Oller, a chiropractor. He saw Dr. Oller twice a week and the visits

⁷ P.H. Trans. (Nov. 19, 2008), Cl. Ex. 3.

⁸ *Id.*, at 27 and Cl. Ex. 2.

⁹ R.H. Trans. at 9.

¹⁰ P.H. Trans. (Nov. 19, 2008) at 14.

occurred between July or August and September 2010.¹¹ Dr. Oller's treatment was not authorized by respondent.

The ALJ appointed Dr. Peter V. Bieri, certified as a Fellow in the American Academy of Disability Evaluating Physicians, to examine claimant. Claimant saw Dr. Bieri on February 17, 2011. Dr. Bieri examined the medical records of Downtown Chiropractic, Stormont-Vail HealthCare, Cotton-O'Neil Clinic, Dr. Curtis, Dr. Oller, Dr. Gurba, Dr. Lepse and Dr. Saylor. No x-rays were available for Dr. Bieri to review. Dr. Bieri obtained a brief history from claimant and physically examined claimant. Claimant was taking hydrocodone for pain and using a cane when he saw Dr. Bieri. Claimant was uncertain who prescribed the hydrocodone.

From the testimony of claimant and Dr. Bieri, it is apparent that claimant had preexisting degenerative joint disease in the left knee. Based upon the *AMA Guides*,¹² Dr. Bieri opined claimant has a 50% permanent functional impairment to the left lower extremity.¹³ He indicated that half of the impairment, or 25%, was a result of preexisting degenerative joint disease. This same finding was made by Dr. Gurba, claimant's treating physician. Dr. Bieri stated that apportioning half of the impairment, or 25%, to the preexisting joint disease was ". . . reasonable, appropriate and consistent."¹⁴ Dr. Bieri testified that a 25% impairment to the lower extremity converts to a 10% impairment to the body as a whole.¹⁵

Dr. Bieri testified that subsequent to the left total knee replacement, claimant complained to Dr. Oller of impotence and low back pain. Dr. Bieri indicated claimant first saw Dr. Oller on August 30, 2010. Dr. Bieri stated the claim of impotence was totally subjective and beyond his realm of expertise.

Dr. Bieri indicated claimant had back pain. However, he testified:

I then discussed the low back pain. It was unclear that his back pain was completely related to the injury in question. The claimant had been treated previously for low back pain and I quoted sections of The Guides that are most appropriate for the low back in this instance. There was no specific injury to the low

¹¹ R.H. Trans. at 20-23 and 28-29.

¹² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹³ Bieri Depo. at 11-12.

¹⁴ *Id.*, at 11.

¹⁵ *Id.*, at 12.

back itself, therefore he did not qualify for a DRE rating specifically for the low back.¹⁶

The following testimony of Dr. Bieri is also significant:

Q. (Mr. Pritchard) Okay. Based on your report you have a 10 percent whole body impairment attributable to the lower extremity and the back?

A. (Dr. Bieri) That's correct.

Q. Okay. What would your rating be if there wasn't anything for the back and it was just the knee?

A. The same.

Q. So it would still be 10 percent of the body?

A. That's correct.

Q. In essence, you're not adding a rating for the back?

A. That's correct.

Q. So even though we've converted this rating to body as whole, is it your opinion that there is no permanent impairment related to the back?

A. Based on my examination, claimant had only subjective complaint of pain. There were no objective findings in either of the documentation that I reviewed on physical examination of a rateable injury to the low back, that's correct.

Q. Okay. So based solely on rateable injuries, you came up with a lower extremity rating but essentially a zero percent on the back?

A. That's correct.¹⁷

Dr. Bieri agreed with Dr. Gurba's restrictions of no kneeling, crawling, climbing or squatting with alternate sitting and standing as needed for symptomatic relief. Dr. Bieri left use of a cane up to the discretion of claimant. He also indicated the restrictions did not necessarily place claimant in a sedentary category.

Dick Santner, a vocational rehabilitation counselor, interviewed claimant on January 12, 2011. He obtained from claimant work tasks performed over the 15 years

¹⁶ *Id.*, at 7.

¹⁷ *Id.*, at 13-14.

before claimant's work injury. Mr. Santner identified 20 non-duplicative tasks performed by claimant. Dr. Bieri opined that claimant could no longer perform 14 of the 20 non-duplicative tasks for a 70% task loss. Mr. Santner opined claimant is permanently and totally disabled. He took into consideration the restrictions of Dr. Gurba (agreed with by Dr. Bieri) and restrictions by Dr. Curtis of sedentary activity, predominately sitting and occasionally lifting up to 20 pounds. He also considered claimant's education and work experience.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(d) and (e) state:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹⁸ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.¹⁹

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.²⁰

K.S.A. 44-510d(a) in part states:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66⅔% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation

¹⁸ K.S.A. 2008 Supp. 44-501(a).

¹⁹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

²⁰ *Id.*, at 278.

is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,²¹ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

Although it is interpreting a prior version of K.S.A. 44-510e, *McLaughlin*²² is instructive as to the difference between functional impairment and work disability.

"Functional disability is the loss of a part of the total physiological capabilities of the human body." *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 195, 558 P.2d 146 (1976). Work disability, on the other hand, is "that portion of the job requirements that a workman is unable to perform by reason of an injury." 221 Kan. at 195.²³

Similarly, in *Hanson*,²⁴ the Court of Appeals makes a clear distinction between impairment and disability. "Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent."²⁵ In *Holguin*,²⁶ the Board held: "The Board, in keeping with established precedent and the plain meaning of the statute, finds that a claimant loses the ability to perform a work task when a credible physician opines that the work task cannot be performed within the restrictions imposed for the work-related injury."

²¹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

²² *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, rev. denied 245 Kan. 784 (1989).

²³ *Id.*, at 46.

²⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

²⁵ *Id.*, at 96.

²⁶ *Holguin v. Payless Shoesource, Inc.*, Nos. 1,045,300 & 1,045,301, 2010 WL 3489650 (Aug. 31, 2010).

ANALYSIS

The Board concludes that claimant failed to prove by a preponderance of the evidence that he suffered a back injury arising out of and in the course of his employment with respondent. Dr. Bieri testified there was no specific injury to claimant's back and that claimant had back pain before the accident. He indicated it was unclear the back pain was completely related to the accident. Dr. Bieri testified claimant's complaints of back pain as a result of an altered gait were subjective and, therefore, not a whole person impairment. The 10% functional impairment to the body as a whole given by Dr. Bieri would have been the same with or without claimant's back pain.

Dr. Bieri testified claimant had gait derangement. However, he considered gait derangement as part of a knee replacement rating. There were no diagnostic tests showing evidence of a back injury. Dr. Bieri testified claimant's back pain was subjective and not supported by objective findings. He also opined that he could not within a reasonable degree of medical probability separate claimant's previous back condition, based upon the documentation, history and physical, from claimant's subsequent back condition.

Claimant received minimal chiropractic treatment for low back pain. No evidence was presented showing that claimant received medical treatment for back symptoms. The reports of Drs. Lepse and Curtis do not indicate claimant complained of back pain. It is unknown whether claimant complained to Dr. Gurba of back symptoms, as his treatment notes were not made part of the record.

To summarize, claimant had no objective findings of a back injury, he received limited chiropractic treatment, and Dr. Bieri would have given the same functional impairment had claimant had no subjective complaints of back pain. Simply put, claimant has failed to prove by a preponderance of the evidence that he suffered a back injury arising out of and in the course of his employment with respondent.

CONCLUSION

1. Claimant has a 50% permanent functional impairment to the leg as a result of a knee injury. The parties stipulated to this rating.

2. Claimant has failed to meet his burden of proof that he suffered a back injury arising out of and in the course of his employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²⁷ Accordingly, the findings

²⁷ K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the May 26, 2011, Award entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge